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NO. 231364

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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CODY SOTER, a minor child; FRANCIS SOTER and GLENDA CARR, individually, and as parents of CODY SOTER; THE ESTATE OF NATHAN WALTERS, a deceased minor child; RICK WALTERS and TERESA WALTERS, deceased minor child; and SPOKANE SCHOOL DISTRICT NO. 81, a Washington municipal corporation,

Respondents.

v.

COWLES PUBLISHING COMPANY, a Washington corporation,

Appellant,

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# BRIEF OF AMICUS CURIAE WASHINGTON COALITION FOR OPEN GOVERNMENT

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## I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The identity and interest of *Amicus Curiae* the Washington Coalition for Open Government ("the Coalition") is set forth in the accompanying Motion to file Amicus Curiae Brief filed herewith.

## II. STATEMENT OF THE CASE

The Coalition adopts the Statement of the Case of Appellant Cowles Publishing Company ("*the Spokesman-Review*" or "the newspaper").

## III. ARGUMENT AND AUTHORITY

### A. The Action Below was Procedurally Flawed.

As raised in *the Spokesman-Review*'s opening appellate brief, and addressed by the Spokane School District ("District") in its response, this matter comes to this Court in an inappropriate and fatally flawed manner. The District, which had already decided not to release records to a record requester, filed suit against the record requester seeking a judicial rubber-stamp of the District's decision not to disclose. Courts are not authorized to issue such advisory opinions.[1] Courts are charged to decide only justiciable controversies.[2] If there was any uncertainty whether a legal claim would be filed, there is no justiciable controversy.[3] The possibility

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[1] *Walker v. Monroe*, 124 Wn.2d 402, 411-12, 879 P.2d 920 (1994).
[2] 124 Wn.2d at 411-12.
[3] *Diversified Indust. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814, 514 P.2d 137 (1973) (holding no justiciable controversy between tenant and landlord over liability for guest's

of a future claim for damages and the desirability of a party to be able to presently ascertain his or her risks are not sufficient.[4]

Here, a reporter for the *Spokesman-Review* made a lawful Public Disclosure Act ("PDA") request to the District in August 2001 for records related to the investigation of the death of Nathan Walters and an accident involving another student Cody Soter.[5] Less than two months later, after already determining to withhold the records, and in the absence of any expression by the reporter or newspaper of an intent to file suit over the denial of access, the District filed suit against the newspaper forcing it to appear in court and defend its record request or risk a permanent injunction barring release of the records of these two investigations.[6] Though Nathan's parents and Cody's representatives joined the District's lawsuit, they each withdrew in a matter of months, while the District continued to litigate alone as a plaintiff against the newspaper for nearly three more years.[7]

The fact that the newspaper sought to defend itself procedurally – by bringing a Motion for Order to Show Cause two and a half years into the litigation which was filed in connection with a summary judgment motion

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injury when guest had yet to sue or threaten suit though guest had 20 year statute of limitation period to bring claim).

[4] *Id.*

[5] CP 1-19, 322.

[6] Brief of App. at 10.

[7] CP 20-25, 337-351, 761-767.

filed by the District[8] – does not cure the procedural flaws in the District's action. Agencies should not be allowed to sue record requesters and haul them into court to defend public record requests. The Coalition strongly urges this Court to address this issue, raised by Appellant and squarely before this Court on appeal, and make clear to agencies and courts that courts should not entertain these advisory opinion requests and suits against requesters in the future. The potential for abuse, and deterrence of lawful requests, is considerable, especially for average citizens who cannot afford to hire lawyers and defend themselves against aggressive litigators being compensated at public expense. Few record requesters could have or would have withstood the financial drain and distress of a nearly three year lawsuit (and more than year and a half long appeal).

Though the state Supreme Court in *Dawson v. Daly* appeared to accept that an agency could sue requesters based on RCW 42.17.330, it made clear this was an alternate course from an agency that was relying on an exemption in RCW 42.17.310 and that the agency denying a request based on Section 310 was simply allowed to withhold the record and wait to see if the requester would sue.

> [T]he protection provided by RCW 42.17.330 differs from that provided by the exemptions in RCW 42.17.310(1). An agency believing that requested documents are covered by

[8] CP 34-35, 337-351.

> one or more of the RCW 42.17.310(1) exemptions may, on its own initiative under RCW 42.17.310(4), withhold disclosure until the requesting party initiates a court action to compel disclosure under RCW 42.17.340. In contrast, an agency believing that requested documents are protected from disclosure under RCW 42.17.330 may, on its own initiative, withhold disclosure only so long as is needed for the agency to seek a court determination of the applicability of RCW 42.17.330.[9]

The following year, the state Supreme Court reversed itself stating that Section 330 did not create an independent basis for exemption.[10] The end result of these two opinions is clear. When an agency relies on an exemption to Section 310 as the basis for denying a record, its only remedy is to deny the record and wait for the requester to sue. It has no right or need to initiate suit itself based on Section 330 to rubber-stamp its earlier denial. If the requester sues under RCW 42.17.340, the agency is free pursuant to Section 330 to file a motion or affidavit arguing why records should not be disclosed, but the agency may not ignore well-established doctrine barring use of the courts for advisory rulings.

**B. The Agency Bears the Burden of Proof, Not the Requester.**

The District repeatedly attempts to shift the burden of proof to the requester. The PDA makes clear, however, that the agency at all times bears the burden of proving that records are exempt and must be withheld.

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[9] *Dawson*, 120 Wn.2d 782, 794, 845 P.2d 995 (1993).
[10] *See Progressive Animal Welfare Society v. University of Washington* ("*PAWS*"), 125 Wn.2d 243, 261, 884 P.2d 592 (1994).

The requester need not answer questions about what it knew, what it possesses, what efforts it has made to obtain information, or why it wants information. RCW 42.17.270 reads in relevant part

> [a]gencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.17.260(5)[11] or other statute which exempts or prohibits disclosure of specific information or records to certain persons.

(emphasis added).[12] Thus, the identity, motivation, capabilities or needs of the requesting party, the information that a particular requesting party may have or could obtain elsewhere or the availability of alternate methods to obtain the information, has no bearing on whether the record sought is exempt.[13]

The parties do not dispute that the records are public records. The District must therefore show that they are exempt pursuant to a specific

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[11] Now RCW 47.17.260(9) (commercial use of public records), not applicable here.

[12] *Accord, Sheehan v. King County,* 114 Wn. App. 325, 341, 57 P.2d 307 (2002) (*citing* Attorney General's Office, Overview of Public Records (1995), at 10 ("If a record is available to one, it is available to all. The decision must be based on the content of the record itself, not on the 'need to know' of a particular requester.")); *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989); *In re Rosier*, 105 Wn.2d 606, 611, 717 P.2d 1353 (1986) (release of information is not conditioned upon the use to which the information will be put).

[13] *See Dawson*, 120 Wn.2d at 797-98; *O'Connor v. Washington Dept. of Social and Health Servs.*, 143 Wn.2d 895, 912, 25 P.3d 426 (2001); *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 214, 951 P.2d 357 (1998); RCW 42.17.270; *see also, Carter v. U.S. Dept. of Commerce*, 830 F.2d 388 (D.C. Cir. 1987); *Aronson v. U.S. Dept. of Housing & Urban Dev.*, 822 F.2d 182 (1st Cir. 1987); *Core v. U.S. Postal Service*, 730 F.2d 946 (4th Cir. 1984); *Kurzon v. Department of Health & Human Servs.*, 649 F.2d 65 (1st Cir. 1981); *National Assn. of Retired Fed. Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989).

statutory exemption[14] which is narrowly construed,[15] and that they further must be withheld to prevent examination that is "clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions."[16]

### C. The District Must Prove Other Litigants Would Not Have Been Allowed to Obtain the Records It Seeks to Withhold Under the PDA.

The District must show that the records being denied to the newspaper would necessarily have been denied to a party in active civil litigation against the District.

> Specifically exempted from disclosure under RCW 42.17.310(1)(j) are "[r]ecords which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts." Although awkwardly worded, the statutory provision is not ambiguous. **A plain language interpretation of it is that records relevant to a controversy to which an agency is a party are exempt from public inspection and copying under the Public Records Act if those records would not be available to another party under superior court rules of pretrial discovery. The corollary to this is the records would not be exempt if they are available to another party under superior court rules of pretrial discovery.**[17]

Here, no actual litigation was ever "pending" in the superior court.

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[14] *PAWS*, 125 Wn.2d 243.
[15] RCW 42.17.010(11), .251, .290.
[16] RCW 42.17.330.
[17] *O'Connor*, 143 Wn.2d at 912 (emphasis added).

The matter was threatened, mediated and settled, but suit was never filed. Yet the District must show that all opposing parties in civil litigation would necessarily be denied access to the records it now wishes to withhold under the PDA. It is the District which bears the burden of proving this fact, not the record requester.[18] Thus, the District must show that the Nathan's parents and Cody's representatives and other litigants such as those with suits related to injuries to children while under the District's care would never have been able to obtain through civil discovery any of the records it now seeks to withhold from the newspaper. The District has not and cannot meet this burden.

### D. The District Must Establish Which "Privilege" Applies to Which Records.

The trial court here found the records were "each protected by the attorney-client privilege, or by the work product doctrine, or both."[19] The District argued initially that every record was both an attorney client communication and attorney work product. The District and judge never established on a document-by-document basis which records were attorney client privileged communications, which were work product, and

[18] RCW 42.17.310(1)(j), (4); *O'Connor*, 143 Wn.2d at 912.
[19] CP 765.

which were both, as they must do under the PDA.[20]

### E. Attorney-Client Privilege Applies Only to Confidential Client Communications Conveyed to the Attorney.

The attorney-client privilege is limited to confidential communications made by the client in the course of seeking legal advice from an attorney.[21] It attaches only to confidential communications made by the client and the attorney's advice in response thereto.[22] Accordingly, an attorney's involvement in a particular matter does not automatically render a communication privileged.[23] The privilege protects only the substance of the client's confidential communications conveyed to the attorney.[24]

In this case, documents that do not reveal client confidential communications are not protected by the attorney-client privilege, irrespective of whether the District's attorney was involved in the matter.[25] For instance, statements made by District employees and volunteers, who are not direct clients of the attorneys, are not protected by the attorney-client privilege because the people were neither potential co-defendants

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[20] *PAWS*, 125 Wn. 2d at 271; RCW 42.17.310(4).
[21] *United States v. Flores*, 628 F.2d 521 (9th Cir. 1980).
[22] *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977).
[23] *See id.* at 212.
[24] *Id.* at 211.
[25] *See id.* at 211 (papers prepared by an attorney for the purpose of advising a client are protected only if the papers tend to reveal client's confidential communication).

nor were they considered the District's speaking agents.[26] Similarly, notes prepared by attorney Rockie Hansen concerning a videotaped witness statement by a non-client is not a privileged "attorney client" communication.[27] It involved, at most, communications between two attorneys concerning a witness' testimony. The notes do not contain a confidential communication made by the client to the attorney.

Further, all communications with the District's counsel by someone who is the lawyer's client are not exempt attorney-client communications. The privilege applies only where the client believes he or she is consulting the lawyer in the lawyer's legal capacity and the client is seeking legal advice.

> [W]here one consults an attorney not as a lawyer but as a friend or as a business adviser or banker, or negotiator, or as an accountant, or where the communication is to the attorney acting as a 'mere scrivener' or as an attesting witness to a will or deed, or as an executor or as agent, the consultation is not professional nor the statement privileged.[28]

### F. Work Product Doctrine Does Not Protect Materials Prepared Pursuant to Administrative Procedures or Party or Witness Statements.

The work product doctrine exempts from disclosure documents and

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[26] *See Martin v. Worker's Comp. Appeals Bd.*, 59 Cal. App. 4th 333, 345 (1997) (finding that when an employee is no more than a witness to an incident, rather than a co-defendant or natural person to speak for the employer, his or her statement is not privileged).

[27] *See Dura Corp. v. Milwaukee Hydraulic Products*, Inc., 37 F.R.D. 470, 472 (E.D. Wis. 1965) (finding correspondence between outside counsel and associated counsel not attorney-client privilege).

[28] *State v. Dorman*, 30 Wn. App. 351, 359, 633 P.2d 1340 (1981) (citations omitted).

tangible things prepared in anticipation of litigation.[29] Work product does not protect statements made by parties or other persons "concerning the action or its subject matter" which are signed or otherwise adopted or approved by the person making the statement or contemporaneously recorded or transcribed.[30] It also does not protect materials prepared in the ordinary course of business even though litigation may have been contemplated.[31] When an internal policy mandates an investigation, the documents collected and prepared are not work product. *Collins v. Mullins*, 170 F.R.D. 132 (W.D. Vir. 1996), *citing National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F. 2d 980 (4th Cir. 1992).

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[29] Fed. R. Civ. 23(b)(3); CR 26(b)(4).

[30] CR 26(b)(4).

[31] *See, e.g., Simon v. G.D. Searle & Co.* 816 F.2d 397, 401 (8th Cir. 1987) (finding risk management documents that track and control company's litigation cost not work product); *United States v. Adlman*, 134 F.3d 1194, 1202-04 (2d Cir. 1998) (holding memorandum of accountant/lawyer analyzing tax implications of company's merger containing legal analysis and strategy not work product if created in the ordinary course of business); *Chaney v. Slack*, 99 F.R.D. 531, 533 (S.D. Ga. 1983) (rejecting work product claim for records of school's investigation of student's complaint about excessive corporal punishment); *see also Spell v. McDaniel*, 591 F. Supp. 1090, 1119-20 (E.D.N.C. 1984) (internal police investigation records of police brutality complaints not work product because routine and not in anticipation of litigation; even if work product, requestor would have substantial need); *Mercy v. Suffolk County*, 93 F.R.D. 520, 521-22 (E.D.N.Y. 1982) (same); *Litton Systems, Inc. v. AT&T Co.*, 1979-1 Trade Cases P 62,563 (S.D.N.Y. Mar. 30, 1979) (investigation records of suspected misconduct by sales employees not work product); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596,603-04 (8th Cir. 1977) (law firm's investigation of alleged misconduct by employees of corporation not work product; "work was not done 'in anticipation of litigation,' . . . although of course, all parties concerned must have been aware that the conduct of employees of [corporation] in years past might ultimately result in litigation of some sort in the future"); *see also* Fed. R. Civ. P. 26(b)(3) Advisory Committee's Note (1970) ("Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other non-litigation purposes are not under the qualified immunity provided by [Fed. R. Civ. P. 26(b)(3)]])."

In *Collins*, the plaintiff sought discovery of witness statements taken by the sheriff's office in its investigation of the plaintiff's complaint of a police officer's alleged misconduct. The defendant argued that the statements were protected work product because they were taken in anticipation of litigation though internal regulations required that an investigation be made of all police misconduct complaints. The defendant maintained that the sheriff's office selectively determined when to follow its internal regulations and that an investigation was conducted only when litigation is imminent. The *Collins* court, however, found the statements were discoverable because they were taken in accordance with normal operating procedures under the internal regulations. It reasoned that even though witness statements were not taken after every complaint, the driving force behind the investigation was the agency's internal policy to investigate all complaints.

Here, similar to the defendant in *Collins*, the District argues that its investigation into Nathan's death was made in anticipation of litigation because it retained a law firm and a private investigator to implement its internal investigation procedures, and it, like the defendant in *Collins*, further claimed the District often disregarded its own policies requiring an investigation. But selective compliance with an internal policy does not negate the policy's existence. Nor does retention of a law firm or an

investigator satisfy the "anticipation of litigation" requirement. An investigator and occasionally a lawyer conducted interviews with witnesses and compiled reports of the incident as the District was required to do pursuant to its policy.[32] The District's Superintendent stated the investigator was retained to investigate because the District wanted to make sure the investigation was "objective" and was performed by someone "with experience." CP 309-312.[33] Thus, according to the District's own statements about the investigation, the investigation was at least partially designed to fulfill the District's internal investigative obligations, and not solely in anticipation of litigation or to whitewash the events or hide the facts to avoid legal liability. The District cannot avoid this determination by arguing that it selects when to comply or not comply with its administrative procedures. Such an argument failed in *Collins*, and it must also fail here.

### G. Even if the Documents are Work Product, There is a Substantial Need for Their Disclosure.

Exemption (1)(j) only prevents disclosure to the public if the same records would have been unavailable to a litigant against the agency under the civil discovery rules. A party may obtain work product if that party has

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[32] See CP 249-253.

[33] The District's belated objections to consideration of the Superintendent's statements – which are party opponent admissions and not hearsay – have been waived as they were not raised below when the statements were introduced in the trial court. RAP 2.5.

a substantial need of the materials in the preparation of his case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. CR 26(b)(4).

Thus, for (1)(j) to apply at all, the District must show that other parties in litigation against the District would not be able to obtain the records in question – either by showing they are not privileged at all or by showing substantial need. Thus, as an initial matter, the District must show that Nathan's parents, Cody's representatives, and other litigants with suits related to children injured while in the care of the District could not have shown substantial need for the materials.

The District ignores this point by focusing instead on the initially irrelevant issue of whether the public record requester can show or has shown substantial need for the documents or whether or not the requester answered interrogatories and requests for production about what it as a newspaper uncovered during the course of its constitutionally protected newsgathering activities. To establish exemption at all, the District must first show the other parties to the controversy itself – the injury and death of children – would not have been able to show substantial need.

Substantial need becomes a much clearer issue if examined in the context of the parents. The Walter family, if they had not settled, would have likely brought a tort action against the District. They were required

by state law to wait 60 days before filing suit against the District after filing a notice of claim against the agency pursuant to RCW 4.96.020. After filing suit, they would have been unable to obtain discovery responses or take depositions of witnesses or subpoena their records for another 30 to 70 days. CR 30(a); CR 33(a); 34(b). Their lawyer would have been prevented from speaking with anyone who was represented by counsel. It is highly likely District personnel and defendants would not speak with the Walters or their agents outside of formal discovery procedures. Thus the earliest the Walters could have obtained witness statements would have been several months after their son's death, which was far more distant to the time the District's investigator and attorney obtained statements from these witnesses.

Statements taken shortly after an accident provide an immediate impression of the facts that cannot be recreated or duplicated by a deposition that relies upon memory. *Southern Railway Co. v. Lanham*, 403 F.2d 119 (5th Cir. 1968)(finding appellees would be unable to obtain full and accurate disclosure of facts by deposing witnesses because suit was filed ten months after incident and interrogatories were answered one year after). There is a substantial need for witness statements that are taken within days of an accident because the lapse of time would prohibit the plaintiff from obtaining similar accurate statements. *Smith v. Diamond*

*Offshore Drilling, Inc.*, 168 F.R.D. 582 (S.D. Tex. 1996)(finding statements taken three days after accident discoverable).

Also, the Walters would have needed to know what witnesses told the investigator or lawyer to be able to assess if they were being truthful in discovery responses or trial testimony or statements given to the Walters. Work product that would be useful at trial to impeach witnesses is discoverable under the substantial need exception. *Baker v. General Motors Corp.*, 197 F.R.D. 376 (W.D. Mo. 1999).

Thus, witness statements taken by the District, to the extent they are work product at all, would likely have been deemed discoverable if the Walter family had continued with their litigation against the District.

Additionally, photographs that are considered work product meet the substantial need test if they were taken of a changed condition that was not available for observation by the party seeking disclosure. *Reedy v. Lull Engineering Co., Inc.*, 137 F.R.D. 405 (M.D. Fla. 1991). In this case, drawings and photographs of the Green Bluff farm, if work product, would have been disclosed to the Walters if the appearance of the farm had changed and the Walter family was not able to obtain similar photographs at the time of the incident.

### H. There is No RCW 5.50.070, and RCW 5.60.070 Does Not Justify Exemption Here.

Though the judge based exemption solely on RCW 42.17.310(1)(j), the District argues on appeal that a "mediation" privilege allegedly found at RCW 5.50.070 should be deemed an "other statute" exemption to shield allegedly attorney client or work product privileged communications the District freely disclosed to a mediator and an opposing party in the context of mediation. It appears this argument was not raised below. There is no section 5.50.070 in the Revised Code of Washington. The District is presumed to mean RCW 5.60.070, which prevents introduction in a judicial proceeding of certain communications and materials prepared for mediation when the mediation occurs by court order or written agreement and several other conditions are met and certain exceptions are not, such as "[w]hen the written materials or tangible evidence are otherwise subject to discovery" and "[w]hen disclosure is mandated by statute . . " RCW 5.60.070(b), (d). The District has not established that this statute applies to these records or that under the facts of this case it bars disclosure. Further, the District did not even cite to the statute the Coalition presumes it meant; it cited to a non-existent provision. Arguments raised for the first time on appeal should not be addressed. *Lindberg v. County of Kitsap*, 133 Wn.2d 729, 746, 948 P.2d 805 (1997); *Dawson*, 120 Wn.2d at 794 (declining to

consider exemption argued by agency for first time on appeal).

**I. The District Must Additionally Meet the Test of Section 330.**

The District must establish that in addition to being exempt under a specific PDA exemption, that "public examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." RCW 42.17.330.

The District cannot establish that examination of these records are against the public interest or would substantially and irreparably damage any person or vital governmental function. The records in question relate to the death of a child while in the care of a public school and the payment of nearly one million dollars in damages to his parents. The public wants to know, and has a right to learn, why the District behaved as it did, why the child was allowed to die, and whether the public's checkbook, and other children, are in jeopardy because of District practices and decision-making. The public has a right to monitor the performance of the District to ensure that it is acting in accordance with the law and the best interest of the people whom it is to serve. The public interest will be harmed if public examination of these records are ***not*** allowed. Further, the District has not identified any person or vital governmental function that will be harmed by release of these records other than vague claims by its lawyers

that the records are "classic" attorney client or work product records that merit protection. The trial court erred in granting summary judgment to the District because the District failed to make those showing required by Section 330.

### J. Even if an Exemption Applied, the District Must Produce a Redacted Version.

RCW 42.17.310(2) states in part:

> [T]he exemptions of this section are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought. No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons.

The exemptions listed under RCW 42.17.310(1) are not mandatory, nor does the presence of some exempt information make the entire record exempt. If a document falls under an exemption listed in RCW 42.17.310(1), RCW 42.17.310(2) and (3) require disclosure if the exempt portion can "be deleted from the specific records sought" such that disclosure of the document would not invade a person's right of privacy or interfere with a vital governmental function. *Servais v. Port of Bellingham*, 127 Wn.2d 820, 904 P.2d 1124 (1995). Said another way, if disclosure will not violate a vital governmental interest, exemptions are inapplicable, and if some part of the document would violate such interest,

just that part should be redacted and the remainder of the document produced.[34]

Therefore, even if records could be withheld under exemption (1)(j), the Court is required to examine if disclosure of the records would violate a vital governmental interest, and if so, whether the violation could be prevented by redaction of certain information. Under these circumstances, exemption (1)(j) would be inapplicable and may not prevent release.

## IV. CONCLUSION

The purpose of the Public Disclosure Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. RCW 42.17.251. Courts should "view with caution any interpretation of the statute that would frustrate its purpose." *Bonamy v. City of Seattle*, 92 Wn. App. 403, 408-09, 960 P.2d 447 (1998).

In this case, the trial court allowed a District to avoid disclosure of any records related to the investigation of the death of a 10 year old child because the investigation was turned over to a private investigator and District lawyer. Rather than focusing on the basis for allowing litigation-based privileges and on the information a litigant would be entitled to

[34] *Citizens For Fair Share v. State Dept. of Corrections*, 117 Wn. App. 411, 72 P.3d 206 (2003); *Hearst v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978).

obtain from the District's internal investigation, the District and trial court looked at labels such as who wrote a document or engaged in a conversation rather than the purpose behind the writing or discussion. The involvement of lawyers and an outside investigator was allowed to shield all of the facts from the public except that which the District chose to divulge. If this Court accepts the District's arguments and allows the trial court's ruling to stand, it will be sanctioning this type of behavior by agencies across the state and it will effectively deprive the public of a means of learning anything about an agency's investigation into any sensitive subject. The Coalition urges the Court to hold that the records are not exempt and order that they be promptly released to the public and requesting party.

RESPECTFULLY SUBMITTED this 15th day of November, 2005.

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